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BELMONT CITY CLERK

COUNCIL Agenda # 7-B  
MEETING OF SEPTEMBER 14, 2004



## **STAFF REPORT**

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### **Discussion and Direction Regarding Sex Offender Information**

Mayor and City Council of the City of Belmont  
Belmont CA

Honorable Mayor and Council members:

#### **Summary**

At the August 10, 2004 City Council meeting, Council requested that the City Attorney prepare a report regarding the permissible degree of posting of sex offender registration information on the City's website. The following is an analysis of both statutory and case law as it currently exists in this regard. The City may post the general location of serious and high risk offenders' residences on its website. The Police Department has a map prepared which could be posted on the City website if Council so directs. AB 488, passed by the state Senate and Assembly in August 2004 provides for similar postings beginning in July 2005 by the Department of Justice (hereinafter DOJ) on its website.

#### **Background and Discussion**

In 1994, a seven year-old New Jersey girl by the name of Megan Kanka was abducted, raped and murdered by a neighbor. Her family was unaware that the neighbor had previously been convicted of sex offenses involving young girls. This crime was the impetus for laws mandating registration of sex offenders and corresponding community notification. Smith v. Doe (2003) 538 U.S. 84, 89-90, 123 Sup.Ct. 1140, 155 Lawyers Edition 2<sup>nd</sup> 164. Later in 1994, Congress enacted the Jacob Wetterlang Crimes Against Children and Sexually Violent Offender Registration Program. 42 U.S.C. 14071. Pursuant to its provisions, certain federal law enforcement funding was conditioned upon each state's adoption of a "Megan's Law" requiring the registration of sex offenders and the notification of the communities in which the sex offenders resided. By 1996, every state, the

District of Columbia and the federal government had passed a "Megan's Law."

California enacted its "Megan's Law" in 1996. Statutes 1996, Chapter 908. The state legislature, in its preamble to the statute, declared that sex offenders "pose a high risk of engaging in further offenses after release" and that "protection of the public from these offenders is a paramount public interest." The legislature further found that citizens had a "compelling and necessary interest in obtaining information about released sex offenders in order to adequately protect themselves and their children from these persons." The legislature also declared that because of the public's interest in its safety, released sex offenders "have a reduced expectation of privacy." Statutes 1996, Chapter 908, Section 1(c). In balancing the offenders' rights against the interests of public security, the legislature further found that releasing information about sex offenders under certain circumstances specified in California Megan's Law would further the primary governmental interest of protecting vulnerable populations from potential harm. Statutes 1996, Chapter 908, Section 1(d). The legislature found that 1) the registration of sex offenders was already required by Penal Code §290; 2) the public release of specified information about certain sex offenders was contemplated by Megan's Law; and 3) the contemplated public notice of the presence of certain high risk sex offenders in communities would further the government's interest in public safety.

The legislature, in enacting these statutes, distinguished between "serious" and "high risk" sex offenders. "To protect the safety and general welfare of the people of this state it is necessary to provide for continued registration of sex offenders, for the public release of specified information regarding certain serious sex offenders and for community notification regarding high risk sex offenders" released into the community. Statutes 1996, Chapter 908, Section 1(f). The legislature declared that the policy of releasing information to the public "about serious and high risk sex offenders" was not meant to be punitive but was designed simply to protect the public. (Emphasis added.)

The provisions of California's Megan's Law are found in California Penal Code Chapter 5, Bigamy, Incest and the Crime Against Nature. Penal Code §290 requires the sex offenders to register with the chief of police in the city where they reside. Penal Code §290.4 and 290.45 contain detailed provisions for the collection and limited disclosure of information regarding sex offenders who are required to register per Penal Code §290.

#### **Relevant Provisions of the California Penal Code**

A. **Penal Code §290.4, Sex offender registration; compilation of information for specified offenses; "900" telephone number; income deposit; violations; penalties; report to legislature.**

Penal Code §290.4 mandates the DOJ to compile information on any person required to register as a sex offender because of conviction for sex crimes as enumerated in Penal Code §290.4. The information is to be categorized by community of residence and zip code. The information must include the name and known aliases of the person, a photograph, a physical description, gender, race,

date of birth, the criminal history and the address, including the zip code in which the person resides. This information is commonly referred to as Section (a)(2) information.

Second, the DOJ is required to operate a 900 telephone number for the public to call to determine whether a given person is a registered sex offender governed by Megan's Law. The caller must give his or her first name, middle initial and last name. If the person inquired about reasonably appears to be a registered sex offender, the DOJ must provide the caller with the above-referenced Section (a)(2) information, except that the DOJ may not reveal to the caller the street address of the sex offender, but only the zip code of the area in which the offender resides.

Third, the DOJ must provide a CD-ROM or other electric medium containing the Section (a)(2) information and must update and distribute the CD-ROM to each county sheriff, police departments of cities with a population of more than 200,000 and certain other designated law enforcement agencies. The above-referenced CD-ROM's must be made available for public viewing in accordance with a strict application process involving the presentation of proper identification and, at the agency's option, a statement of an "articulable purpose" for viewing the information. The applicant must sign a statement stating that he or she is not a registered sex offender, understands the purpose of releasing information about sex offenders is to protect the public, especially children, and understands that it is unlawful to use the information obtained from this CD-ROM or other electronic medium to commit a crime against any registered sex offender or to engage in illegal discrimination or harassment of any registered sex offender. Penal Code §290.4(a)(4)(A).

Fourth, Penal Code §290.4 prohibits the misuse of disclosed information and provides for criminal penalties and other sanctions if the information is misused. A person who uses the information to commit a felony shall be punished by a five year term in the state prison. A person who uses the information to commit a misdemeanor is subject to a fine in addition to other punishments. Section 290.4 also prohibits the unauthorized use of disclosed information with regard to health insurance, loans, credit, employment, education, housing and benefits, privileges and services provided by a business establishment. Such unauthorized use makes the user liable for actual damages, punitive damages, attorney's fees and a civil penalty.

Fifth, Penal Code §290.4(f) provides that sex offenders' addresses are generally not disclosed. "This section shall not be deemed to authorize the publication, distribution, or disclosure of the address of any person about whom information can be published, distributed, or disclosed pursuant to this section.

**B. Penal Code §290.45, Information to be provided to enumerated persons, agencies or organizations by law enforcement agency that a registered sex offender is likely to encounter in order to protect the public; information to be disclosed; releasing information with respect to high-risk sex offenders; immunity from liability; illegal use of information.**

Penal Code §290.45 provides for additional disclosure of information in two instances:

1. Where there is a reasonable suspicion that a person is at risk from a sex offender. Penal Code §290.45(a).

Reasonable suspicion exists “when a peace officer reasonably suspects, based on information that has come to his or her attention through information provided by any peace officer or member of the public, that a child or other person may be at risk” from a sex offender. In that instance, the law enforcement agency may disclose to persons or organizations “the offender is likely to encounter, including schools, day care centers, organizations serving individuals likely to be victimized and other community members at risk” per Penal Code §290.45(a)(1)(A)(B):

- A. The sex offender's full name and known aliases;
- B. Gender and race;
- C. Physical description and photograph
- D. Date of birth;
- E. Crimes resulting in registration and the date of their commission;
- F. The type of victim targeted by the offender;
- G. Any relevant parole or probation conditions;
- H. The date of release from confinement; and
- I. The offender's enrollment, employment or vocational status with any institution of higher learning.
- J. The above-referenced information may also include “the offender's address which must be verified prior to publication” and the description and license plate number of vehicles the offender is known to own or drive.

2. In the case of a high risk offender. Penal Code §290.45(b).

In the case of a high risk offender, added disclosure is authorized. Section 290.45(b) sets forth a detailed definition of a high risk offender. In essence, a high risk offender is a registered sex offender who has been convicted of multiple sexual offenses including at least one violent sexual offense as defined in the statute. Penal Code §290.45(b)(1)(A)(B)(C). The DOJ is statutorily obligated to continually search the records of registered sex offenders and identify all high risk sex offenders. Four times each year, the DOJ sends to every police chief and county sheriff and to other designated law enforcement agencies upon request, information identifying high risk sex offenders. Penal Code §290.45(b)(2). The DOJ and any law enforcement agency receiving such information

may disclose "by whatever means the agency deems necessary to ensure the public's safety, information equivalent to the subdivision (a)(4) information discussed above including the address of the high risk sex offender."

### **Pending Legislation**

On August 19 and 24, 2004, the state Senate and Assembly passed AB488. This bill would require the DOJ, on or before July 1, 2005, to make specified information about certain sex offenders available to the public via its internet website and to update that information on an ongoing basis. This information would include all of the information currently available to the public via the CD-ROM, and would also include the home address of specified offenders. Those offenders are defined as persons convicted of kidnapping of a child under 14 years old, rape, spousal rape, oral copulation, sodomy, rape by instrument, rape by foreign object, rape involving violence or threats of retaliation, oral copulation of a child under 14, or person deemed mentally incompetent, aggravated sexual assault of a child, continuous sexual abuse of a child, lewd/lascivious acts with a child under 14 years old or penetration of genital/anal openings with a foreign object. For offenders convicted of less serious sexual offenses, the bill would require posting of "the community of residence and zip code in which the person resides."

### **Attorney General Rulings Interpreting "Megan's Law"**

The Attorney General, as head of the DOJ, plays a key role in administering Megan's Law and has interpreted the law as establishing three classifications of sex offenders: high risk, serious and other. Megan's Law defines a high risk sex offender but does not define a serious sex offender. The preamble to the legislation contemplates that a serious sex offender is of a class less severe than a high risk sex offender. The Attorney General has defined a serious sex offender as one convicted of certain offenses including child molestation who does not have the aggravated criminal records sufficient to qualify him/her as a high risk offender. According to the Attorney General's interpretation, Megan's Law permits public disclosure of information regarding only high risk and serious sex offenders, not those classified as "other" whose only convictions for sex offenses are a "relatively minor crime involving pornography, exhibitionism and misdemeanor sexual battery."

### **Case Law Interpreting "Megan's Law"**

Jeffrey Garrett v. City of Fremont (2004) 119 Cal.App.4th 408, 14 Cal.Rptr.3d 437, decided on June 11, 2004, is the first case directly addressing the permissible scope of sex offender postings on a city's website.

The Fremont Police Department posts on its website a pin map labeled "Megan's Law Sexual Offender Map." The map contains street maps indexed by neighborhood of the nearest park or public school, community park, or library. Maps of each neighborhood show all schools, library parks and community centers as well as the general location of the residence of registered sex offenders in relation to those schools, libraries and parks. The general location is indicated by a color dot on the

map, red for high risk offenders and purple for serious offenders. No postings are done for "other" registered offenders. The maps do not contain the name, street address, or other information identifying a particular sex offender.

Jeffrey Garrett was convicted of Penal Code §647.6, annoying or molesting a child under the age of eighteen, a misdemeanor. He was required to register as a sex offender under Penal Code §290. Pursuant to Megan's Law, due to his conviction, plaintiff was considered a "serious sex offender." The Fremont Police Department placed a purple dot on a pin map of plaintiff's neighborhood, thereby notifying the public that a serious sex offender resided in that neighborhood. Plaintiff, in litigation, claimed that as a result of the placement of a dot on the pin map, his neighbors learned of his presence and subjected him to harassment and verbal abuse, causing him to move from his parents' house. Plaintiff sued the City of Fremont and certain of its employees alleging that the placing of the dot on the department's pin map disclosed the "location of his place of residence without reasonable suspicion as required by Penal Code §290.45." He also alleged that the placing of the dot on the pin map incorrectly and unlawfully identified him as a serious sex offender. The Appellate Court granted summary judgment in favor of the City and Mr. Garrett appealed. The Court of Appeals, in rejecting his appeal, held:

1. That the city's pin map disclosing only the general location of serious and high risk sex offenders' homes did not violate the disclosure allowed by Megan's Law;
2. Disclosure of a general location of the serious and high risk sex offenders' residence did not violate his or her right to privacy; and
3. Location of the general vicinity of a serious sex offender's address did not create an actionable invasion of privacy.

### **Conclusion**

California's "Megan's Law" by its terms, allows for the disclosure of the general location of place of residence for serious and high risk sex offenders. This interpretation of Penal Code §290.45 was affirmed by Garrett v. City of Fremont. The California Penal Code does not make provision for posting of this type of information for "other" sex offenders who are not categorized as serious or high risk sex offenders.

According to the Belmont Police Department, within the City of Belmont there are 25 serious and 0 high risk registered sex offenders. Per Penal Code §290.45 and Garrett, information may be posted on the City's website indicating the general area in which they reside. A map showing the general location of the 25 serious sex offenders has been prepared by the Police Department and can be posted on the City's website if Council now directs staff to do so.

The Council asked for information regarding the practice followed by San Carlos, which is already posting such information on its website. The San Carlos City Attorney and the Police

Department advise that the posting available on its website contains information regarding serious and high risk sex offenders. The city does not post information regarding "other" sex offenders.

If AB488 is signed by Governor Schwarzenegger, the state will be posting this additional information on its website as well no later than July 1, 2005.

**Fiscal Impact**

None.

**Recommendation**

The Council provide direction to the Police Department regarding the posting of information permitted by Penal Code §290.45 for serious and high risk offenders.

**Alternatives**

1. Refer the matter back to the Police Department and City Attorney for additional information.
2. Provide direction that no postings shall be made to the City's website.

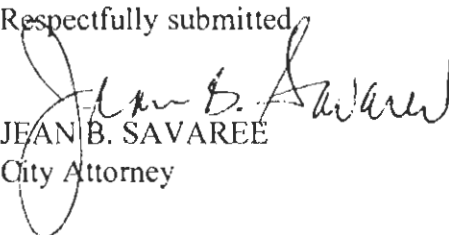
**Public Contact**

This matter was placed on the agenda and posted as required by the California Government Code.

**Attachments**

None.

Respectfully submitted,

  
JEAN B. SAVAREE  
City Attorney